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Thomas Duve

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Global Legal History – A Methodological Approach

Thomas Duve*

Since the 1990s, the attempts to supplement the conventional, overwhelmingly national historiographical traditions by way of introducing a global dimension have been on the rise. In the meantime, an increasing number of legal historical publications make use of the term 'global'. There are programmatic articles and attempts at institutionalization. Transnationalization of law and the rise of global history and global studies in general are having an impact on legal historiography. Due to the significant transformations the world's legal systems are currently undergoing, there is a need for fundamental reflections about law and legal scholarship, and a new call for long-term perspectives on a global scale. As a result, there is a growing demand for global legal history.

Despite these developments, global legal history is a field that is only slowly beginning to take shape. Different national and regional traditions of writing legal history, for example, Anglo-American, Asian, Belgium, Dutch, French, German, Italian, Iberian and Ibero-American legal histories are increasingly integrating transnational perspectives into their analytical frameworks. The 'worlding' of academic communication (D'Haen 2016) and the growing international cooperation have caused a slow but steady process of transformation of methods, canons of knowledge, and academic practices—even in the comparatively small field of legal history. There is a transnational and interdisciplinary discourse emerging, complementing the local and national traditions. However, these transnational discourses are translated into national historiographical traditions and institutional settings. As a result, there is neither a consensus as to what global legal history is, nor as to what objectives this kind of legal historiography pursues, nor even as to where it is to be located in relation to other disciplines. In addition to this, global legal history reflects the traditional multiplicity of methods, aims, and forms present in current juridical historiographies. This is the reason why it is difficult to speak about *a* method of global legal history. Perhaps it is not even desirable to do so.

With this in mind, this contribution – written from a German, or 'Western', perspective – can only strive to sketch out a general panorama and some particular methodological problems concerning global legal history. It begins by considering meanings and disci-

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plinary assignments of 'global legal history' (A.). It then sketches out some methodological approaches (B.). The final remarks will emphasize that not only the intellectual, but also the institutional presuppositions for a global production of legal historical knowledge need to be established (C.).

A. Global Legal History: Its Various Meanings and Disciplinary Assignments

1. Legal History in a Global Perspective and the History of Globalization of Law

If asked what is meant by global legal history, one might distinguish two principal meanings: global legal history refers to the attempt to write the legal histories of any given place or time in a way other than it has been done traditionally, i.e. from a national perspective (*a*). It can also mean a legal historiography that deals with a specific object—namely, the history of the globalization of law (*b*).

a) Legal History in a Global-historical Perspective

If one understands "global legal history" to mean "legal history in a global perspective," then the concept characterizes precisely this – a perspective. Global-historical perspectives should assist in changing, expanding, or supplementing the content and forms of legal historiography that have grown out of national, continental, or via other traditions. Global legal history then is especially interested in the reconstruction of the historical interaction between actors and actants—often remote from one another—or even in the interaction between members of different historiographic communities. One might ask, for instance, how certain events and situations of Asian, Latin-American, and European legal histories might have been influenced by each other—and what, e.g. a Chinese, Mexican, and Spanish legal historian might have to contribute to their respective legal histories. What did European expansion mean for the formation of seemingly 'continental' and 'national' legal orders in Europe? How has European tradition been translated in non-European areas? How has the image of, for instance, Asian legal traditions shaped the self-perceptions of some Europeans? How did the European image influence the self-perceptions and legal historiographies of African, Chinese, Japanese, Indian jurists? These would be some typical questions that can be raised from the perspective of global legal history (for an overview of some of these questions, see, for example, Benton 2010; Duve 2012, 2014b; Halpérin 2009; Ruskola 2013; Srikantan 2014; Zhang 2016).

This global perspective can have quite different effects. In the first place, global perspectives can mean a critical examination and modification of the spatial framework underlying many legal historiographical traditions. This is of particular relevance given that the academic institutions as well as the intellectual and analytical traditions of legal historiography originate

from the nation-state era. Consequently, the nation-state and its spatial configurations were made the natural point of reference for research (Duve 2014c). However, looking at antiquity, medieval, and early modern legal history, it seems clear that not national, but larger imperial spaces were more often than not the norm of legal history (Benton 2012; Benton/Ross 2013). Both *inside* and *between* these imperial spaces there was a multiplicity of interconnections and reciprocal interactions that have to be taken into account. It was not uncommon that precisely those imperial experiences made 'European' institutions what they are today. For instance, early modern legal reasoning in some parts of Europe was not least influenced by the School of Salamanca, which itself can only be understood within the context of the imperial expansion of the Iberian monarchies. The normative reasoning of theologians, jurists, or philosophers is not only a 'Spanish' or 'Portuguese' phenomenon, but a contingent consequence of the first globalization, which modified the way the legal system was developed further on (for further references see Duve 2012). The same can be said for central doctrines of European legal thought like 'sovereignty' (Benton 2010), or the formation of international law, which is 'European' only in this sense that there was a European hegemony in its production (Koskenniemi 2011, 2014). However, there were considerable contributions made by so-called 'semi-peripheral jurists' (Becker Lorca 2014). Slavery and its abolition, to name but another example, have been treated as part of national histories; however, these national histories cannot be understood without the transnational framings of slave law (Gross/de la Fuente 2013). In an analogous way, the colonized regions have reasons to scrutinize the spatial dimensions of their historiography. Often, they have written their histories in terms of a pre-history to their inclusion into a colonial empire. There is, for example, no legal history of Latin America that includes a substantial portion of the legal past preceding European colonization, and it would, perhaps, make no sense to integrate these pre-colonial histories into a spatial framework shaped by colonial historiography (Clavero 2014). And there might, for instance, never have been something like 'Hindu law' (Srikantan 2014). Intellectual de-colonization might thus not only mean to include other forms of normativity and social organization, but also raises questions about different spatial configurations of the legal histories of regions forced into imperial structures by the colonizing powers.

Furthermore, the 'birth of the modern world' (Bayly 2004), the independence movements of the late 18th and early 19th centuries, and the era of the nation-state—with its emblematic juridical institutions—need to be understood in their global context. The century of nation-building in Europe and the West was, at the same time, a period when globalization of law and legal thought were on the march and extremely influential (Kennedy 2006). The juridical monuments of this nation building, i.e. codifications and constitutions, are part of a complex process of communication that, in some respects, possessed a global dimension. Codes and constitutions from different parts of the world circulated and were translated, to a greater or lesser degree, into each nation's realities (see, for example, the contributions in Duve 2014a, especially Zimmermann 2014).

Legal history in a global perspective also opens up the possibility of an expansion of analytic categories. This holds true not only for the post-colonial historiography and its insis-

tence on taking into account different epistemologies and theories from the South (Costa 2013; Santos 2014; Comaroff/Comaroff 2012). Beyond the accompanying revision of historical narratives, questions and topics of historical research can be transferred to the legal histories of other regions. For instance, the exchange with Anglo-American legal historiography or colonial legal history is presenting the continental-European tradition with questions neglected in their own discourse, such as the relevance of pragmatic literature, laymen's justice, non-secular concepts of law and their far-reaching impact, history of the judiciary, of minority groups and inequality, etc. At the same time, *ius commune*, for instance, was for a long time underestimated in many non-European legal historical communities and is being rediscovered as an underlying grammar and vocabulary of communication about law on a global scale (see, for example, for the Americas Tau Anzoátegui 2002; Cassi 2004; Straumann 2016). Thus, global-historical perspectives contribute—as do all comparative studies—to a fruitful and productive alienation of one's own research object by means of a changed point of observation. They contribute to a de-centering and thus re-interpretation of (legal) history (Davis 2011; Conrad 2016).

In addition to this expansion of spaces, the analytic categories, as well as the questions and topics of a traditional nationally-oriented legal history, there is also an emancipatory function, above all, with regard to those regions where—in the face of the hegemony of the European research tradition in the 19th and 20th centuries—use was made of European categories to analyze their own legal histories. What has been written in the context of economic history already twenty years ago still applies to legal history: "History often seems to reach non-Western peoples as they come into contact with Europeans. Their modern histories are conventionally constructed along the axis of native responses to Western challenges. Alternatively, the cultural and historical integrity of non-Western societies may be considered apart from European influences, or as hybrid societies built from a combination of native and Western influences" (Bin Wong 1997, 1). The examples are manifold, and not restricted to starting the history of law of, for example, Hispanic America with the colonization by the Spaniards. Some Japanese legal historians, for example, drew on German concepts to write Japanese history and might need to search for their own analytical framework (Nishikawa 2007a, 2007b). Increasing consciousness about the enduring intellectual impact or even imperialism of Western scholarship can help to create a new conceptual ground for non-Western legal histories (e.g. for China, see Bourgon 2002; Ocko 2004; for India, see, for example, Srikantan 2014). Finally, strengthening global-historical perspectives also means making room for, up to now, non-hegemonic historical narratives. The history of constitutionalism or of human rights, for example, would have been written differently had it not been purely the history of white men, with important consequences for many indigenous peoples and world history as such (Clavero 2005; 2014; 2015).

b) The legal history of the globalization of law

The second way in which global legal history can be understood is that it deals with the globalization of law. As such, it does not represent a perspective, but rather a broadening of the scope of legal historical scholarship as well as the topics and issues it treats. Its object of investigation is the impact of the space-time-compression (as it is characterized with regard to 'globalization') on law and the role of law in this process. A legal history of the globalization of law is insofar dedicated to a specific case of the constantly observable emergent reproduction of law within time and space, stretching across broad expanses of space and thus transgressing different epistemic communities or 'legal cultures.'

Understood in this way, global legal history is engaged, on the one hand, with local reproduction of norms within the horizon of potential global normative offerings, or 'legal traditions' (in the sense of Glenn 2006, 2014). Its interests are directed toward processes in which various normative offerings compete with one another, and where the actors—individuals or groups—can or must make a choice. It deals with cultural translation of normativity. It asks, for example: How were normative orders with universal claims like *ius commune* translated into regional practices? Which changes in their significance can we observe? Why and in what way did Chilean or Japanese jurists in the 19th and 20th centuries choose specific—French, German, English—models and not others? How did this affect juridical practices, legal reasoning, or administration of justice? (For more on this, see the contributions in *Rechtsgeschichte – Legal History* 22, 2014).

At the same time, global legal history is about the analysis of the coexistence and interaction of different normative orders. Often, this coexistence is associated with the circulation or migration of people, objects, ideas, and institutions in colonial contexts. Merchants, missionaries, soldiers, social elite, bureaucrats, settlers, sailors, or even slaves took their conceptions of right and wrong, their privileges and duties, quite often even their jurisdictional powers over members of the same community and others with them on the journey. Situations that are described as 'legal' or 'jurisdictional pluralism' were the result (Benton/Ross 2013). A long-term consequence of such processes of interrelation was the emergence of 'interlegality' (Hoeckema 2005) and some specific transnational or 'global' normative orders, like international law. Yet, there are still many more cases—one need only think about the law of the Catholic Church or even practical moral theology, about maritime, trade, and business law, or, more recently, one can consider constitutional law and constitutional principles (e.g. 'rule of law'). Global legal history asks: What happened in these processes of coexistence of different normative orders? What effects do the interrelations have on our taxonomic projects of ordering the world into legal circles, legal families, legal cultures, and on discussions of our legal system today? Which role did the law and other forms of normativity play in constructing formal and informal empires? Why and how do legal regimes change under conditions of global communication? Do we discover distinct historical rationalities of organizing justice by difference and reasonable accommodation between members of different regulatory groups?

To deal with these immense questions, the history of the globalization of law has to draw upon scholarship from the humanities and social sciences. However, it can also access large repositories of knowledge stemming from the legal-historiographic tradition. The processes of exchange and coexistence of different groups in the Hellenistic Mediterranean, the Roman Empire, Byzantium, the Carolingian Empire, the Holy Roman Empire of the German Nation, the empires during the age of European expansion, the so-called reception of the Roman-canonical law, the expansion of ecclesiastical law across the globe, the imperialism of the 19th and 20th centuries, and the phenomena of an informal, normative imperialism, such as the spread of the Anglo-American legal culture, are just a few of the most well-known examples from the science of legal history. It makes available a great deal of rich historical material for the study of the globalization of law. Of course, one important condition for making this kind of research fruitful is that the often times euro-centric and diffusional perspective inherent to this tradition is critically questioned and scrutinized (see, for example, Duve 2012, 2014a; 2014b; Zhang 2016; from the perspective of general global history, see Conrad 2016).

2. Between History and Law

As a specific manifestation of the general legal history scholarship, global legal history shares the broad spectrum of possible aims (thus methods as well) as general legal history. A great deal has been written about legal history's disciplinary orientation, i.e. whether it leans more in the direction of history or legal science (see, for a review of some discussions Duve 2012; on the new historical jurisprudence, see, for example, Dubber 2015). Not wanting to take up this particular discussion here, it seems prudent to distinguish between two disciplinary assignments. For it is the epistemic interests directly connected with the respective disciplinary classification that influences the topics and questions, thus the methods as well. In this respect, global legal history can be understood as a special field of historical research (*a*) and as belonging to the legal-scientific basic research (*b*).

This classification is not meant to be exclusive. On the contrary, global legal history as basic research for legal scholarship can only be meaningfully carried out if it is understood in terms of historical research whose methods and logics are taken into account in order to serve—on this basis—the additional specific epistemic interests of legal scholars.

a) Global Legal History as a Special Area of historical research

Global legal history is, first of all, a special area of global historical research with all its wide-ranging aims (see on general global history, for example, Sachsenmaier 2011; Hunt 2014; Conrad 2016). What makes global legal history special as a historical sub-discipline of global history is that it deals with such historical phenomena that are connected with the time-space compression characteristic of globalization and its legal dimension (see, for example, Halpérin 2009; Letto-Vanamo 2011; Duve 2014d). It can be written both as a legal history

in a global perspective or as a history of the globalization of law. Global legal history as a historical discipline is devoted, in particular, to the phenomena of reproduction and translation of normativity over great spatial expanses. It inquires into the emergence and quality of legal spaces; it asks about the dialectic of universality and particularity, as well as the content and relationship of legal cultures and traditions to one another. It can investigate, for example, how nation-building was made possible via recourse to the transnational networks and what role law stemming from other countries played in the transformations of legal systems. Global legal history can trace formal and informal imperialisms and mutual influences, and it can uncover implicit understandings and logics of long-lasting reproduction of legal thinking. It can show the historical importance of law as a means of shaping societal relations and structures. As a result, it is confronted with the classic methodological difficulties, for instance, the possibility of forming meaningful comparative groups or instruments for the analysis of cultural reproduction in space and time. Moreover, global legal history has to be attentive to the specificity of normativity as a special case of cultural production, to the high technicality, and the resulting particular modes of reproduction of the cultural system 'law' in time.

b) Global Legal History as Part of Legal Studies

If global legal history sees itself as belonging to legal-scientific research, i.e. as part of legal studies, then it must take up the epistemic interests of the legal-scientific discussion. As such, it has the possibility of incorporating its historical research into a discourse about the evolution of law. It can contribute to legal scholarship, with its respective aims and goals, and which might vary amongst different legal traditions and systems.

In some sense, however, it has to do so differently than was the case in the 19th century European tradition of legal history; a tradition strongly shaped by the interests of current law and always in danger of distorting the image of the past by applying contemporary concepts, which were viewed as expressions of higher universal truths (regarding this tradition, see Duve 2012, 2014b). In contrast to this, global legal history has to establish a dialogue between scientific communities from different legal cultures and areas concerning their conceptions and portrayals of the global past as well as about their expectations as to how this past shapes the future of their legal systems. It has to analyze legal histories from a global perspective as well as examine the globalization of law with a specific interest in providing a conceptual framework, theoretical models, and not least analytical tools for assessing the evolution of law on a global scale. If done well, it can turn out to be the central field of reflection concerning the evolution of law under conditions of globalization, above all, in close cooperation with legal theory, legal sociology, and other fundamental studies of law. It can help to create the preconditions and lay the foundation for a transnational legal scholarship and, at the same time, fulfill a critical function within the legal system.

(1) Globalization of Law, General Jurisprudence, and Global Legal History

This particular way of conducting global legal history is currently in great demand, for one of the most important tasks of legal science today consists in analyzing and perhaps even shaping the fundamental transformations of the world's legal systems (see, for example, Hertogh 2008; Sieber 2010; Menkel-Meadow 2011; Michaels 2013; Zumbansen 2010, 2012; Darian-Smith 2013). Owing to the growing globalization, deregulation, and digitization of our societies, a process of denationalizing law and justice, which delegates more and more space to the regulation of the private sector, has been going on for decades. Of course, and in contrast to the all too common proclamation, the State is not dead—most recently propagated in the 90s. However, in many areas of life, agreements traditionally made on the basis of national laws must now also rely on normative frameworks of non-state regulations and non-national laws. New non-state norms and decision-making institutions have emerged, e.g. in the regulation of the internet or in sports. In fact, this development has led some jurists to speak of *leges oeconomicae*, *lex digitalis*, *lex sportiva*, etc. With this development, new forms of extrajudicial settlement have replaced state judicial instruments; *forum shopping* can be practiced more widely, with significant economic and legal consequences. In a parallel process, we have witnessed a major upturn in the export and import of law and allied services since the 1990s, which has significantly advanced the cause of Anglo-American law. The problematic side of this development has been visible especially in so-called developing countries, which suffered from the consequences of what is considered a new informal imperialism. Apart from the political evaluation one might make of this process, and despite recent tendencies to strengthen state-authority, it is quite probable that this process of the transnationalization of law as well as the emergence of new regulatory arrangements and modes of regulation are here to stay. They need to be observed, shaped, and analyzed by scholars, who somehow try to accompany this process in a constructive and critical manner.

However, the phenomenon of a non-state normativity that transcends national and often also cultural boundaries is not just restricted to the world of economy, sports, or neo-liberal reforms. With the growing diversity within our own societies, the importance of normative spheres independent of a specific national legal framework, and sometimes separate even from a dominant culture in the immediate environment, is becoming perceptible in our daily lives. Rules deriving from religious convictions are lived and enforced within national legal orders of which they are not an integral part. These developments raise the question of how normative orders and decision-making systems that have grown independent of state structure can be legitimated, controlled, and integrated into the existing and changing state-centered legal orders. Due to this situation, there continue to be lively academic debates, and we can observe the institutionalization of studies on 'global law' or 'transnational law' through research programs, databases, journals, books series, and new curricula. Still, this growth does not automatically imply the emergence of a 'transnational legal scholarship.' Such a scholarship is not merely an institutional challenge, but predominantly an *epistemic* and *theoretical* one. It requires the willingness and capacity to emancipate itself from tried and true categories, methods, and principles—which might not be adequate on a transnational

scale—as well as search for new ones. It must be open to alternative ideas of normativity, to different internal structures of law and legal scholarship, also to a broad spectrum of ideas generated by academics from different cultures, because a global or transnational legal scholarship cannot be conceptualized according to the national tradition of one single participant in a discourse. It must allow diverse legal cultures and traditions to enter into a dialogue with one another, to collaborate on research questions before subsequently processing them, and to allow participants to learn from one another. This epistemic challenge might entail generating and accumulating a lot of what might seem 'non-juridical knowledge' and developing corresponding research infrastructures to do so. In addition to this, transnational legal scholarship also poses a *theoretical* challenge. It has to develop its own concepts and methods – and not just fit the 'global production of norms' into its own existing intellectual structures and legal systems. It must ask if and how we can conceive of an analytical framework that is sufficiently broad, devoid of cultural assumptions, open to the normative ideas of the entire world, yet that still somehow manages to retain its analytical force (see on this Duve 2014c).

Both types of challenges, the epistemic and the theoretical, have been discussed over the past few years, sometimes under the rubric of *general jurisprudence*, meaning a discipline that examines structural elements of law within the context of globalization (for example, Twining 2009). This discussion has shown that a transnational legal scholarship conforming to these standards must also be especially receptive to its 'neighboring' academic disciplines. In a sense, it can only be based on a transdisciplinary approach. It might even turn out to be a broader science of norms or science of regulation.

Precisely here is the point of departure for a global legal history as part of a general jurisprudence. For the epistemic and theoretical challenges confronting a general jurisprudence correspond to those of global legal history. The intellectual potential of global legal history is thus relatively great: as a discipline, legal history, which specializes in the analysis of the evolution of law in a variety of quite different contexts, already deals with many of the fundamental questions involved in a general jurisprudence, and it does so on a daily basis. As an interdisciplinary field of research, global legal history can act as a bridge and make available key instruments developed specifically for general jurisprudence. It can also provide preconditions for a dialogue between different legal cultures, by analyzing their legal traditions and offering a framework for discussions.

(2) Critical Global Legal Histories

Insofar as legal historical research possesses a *constructive* dimension, it also performs another important task: a critical, sometimes even *deconstructive* function (see Dubber 2015). For every legal order and every reformulation and modelling of the law (Rechtsfortbildung) rests on path dependencies, narratives of justification, and exemplary models derived from explicit or implicit conceptions about the past. Every legal order is context dependent. A fundamental aspect of historical research involves the disclosure, examination, and, when necessary, revision of these implicit understandings and conceptions. An insight regarding the path dependencies, however, does not necessarily force a departure from the path; rather, it will

enhance the awareness for historical contingency and thus amplify the spaces of freedom. Last but not least, global legal history—understood as a discipline observing the evolution of law, and with its expertise in the analysis of the mediality of law—should be concerned with the process of globalization and digitalization of our societies, its effects on the legal system, and analyze these transformations from a historical perspective.

Critical legal histories have produced important results during the last decades. Illustrative examples for this critical function have been provided by the historiography of international law (Fassbender/Peters 2014). In the same vein, important works in central and classical fields of legal historical research, like the history of constitutionalism or human rights, and their insistence on the need to generate global perspectives and methods necessary for reconstructing interconnections and interdependencies have been published in recent years (Moyn 2010; Clavero 2014, 2015). Of fundamental importance has been the critique concerning the self-conception of the European or Western legal tradition. Here, global legal history can, under certain circumstances, call into question a basic consensus of the Western self-conception and open up a dialogue with those legal cultures currently engaged in a process of emancipating themselves from previously hegemonic intellectual frameworks.

B. Methodological Approaches

In light of these general remarks on possible meanings and disciplinary assignments of global legal history, one might consider four methodological approaches as especially important. They do rely on some theoretical assumptions about the evolution and reproduction of cultural systems, which cannot be outlined here (regarding theories of change and their relevance for legal history, see Zhang 2016; more fundamentally, concerning recent theoretical approaches to understanding change in history, for example, see Campbell 2010; Greve/Schnabel 2011; Mahoney/Thelen 2010; Rosenthal/Bin Wong 2011; Schimank 2002; Sachs 2015). However, they might be applicable in day-to-day research, even detached from their theoretical underpinnings.

First, due to the need to reconsider the traditional spatial settings of legal history, global legal history has to reflect on how local and global legal histories can be placed in relation to one another – 'Glocalization' (1). It must develop a terminology in order to differentiate between various modes of normativity as well as their dynamics of interaction – 'Multi-normativity' (2). Global legal history needs to consider the problem of finding an analytical framework for comparison – 'Typology' (3). Finally, it has to develop a method for the reconstruction of the appropriation process of normativity, intimately linked with the other challenges – 'Translation' (4). These four methodological approaches thematize elementary methodological problems that every form of legal-historical research considers. They are, however, tailored to the specific requirements and aims of global legal history and gain specific importance in the context of global studies. Moreover, they should enable a method-

ological contemplation about law within the context of globalization and thus assist in the carrying out of global legal history both as a historical discipline and as a form of what in the German-speaking tradition is called 'legal-scientific basic research', *rechtswissenschaftliche Grundlagenforschung*.

1. Glocalization

The first of the methodological approaches addresses the problem of how local and global spheres are related to one another. The tension between both poles has, in the past, often been dismantled by means of a local or a diffusionist reduction. Lawmaking, judicial activity, or legal reasoning was either explained solely in terms of the local or national situation, or one only looked at the dissemination of certain bodies of laws or methods—and spoke then about the 'triumphal march of Roman law' or the 'worldwide validity of the BGB', of the Code Civil, etc. Both forms of reduction served not least the interests of national historiographies, because innovation was seen as a national product or as a consequence of a worldwide reception of a national product. However, despite the significant knowledge these reductionist academic practices generated, in the end, both are intellectually unsatisfying.

A global legal history, in turn, has the need and the opportunity to make this tension fruitful. It has to ask precisely for the right balance and accommodation between local and global perspectives. This means, in the first place, an openness for global dimensions. At the same time, it means methodologically prioritizing the local. For only when our focus is concentrated on the concrete location where legal reasoning takes place, where law is determined and enacted, can the processes of the (re)production of law be reconstructed. Only from this local perspective, can the epistemic and communicative setting be traced out and then regional or global connections established.

This necessity of prioritizing the local conditions of cultural production and combining it with global dimensions has sometimes been called 'glocalization', an expression which fits many fields of cultural production (see, for example, Robertson 1995). Its necessity, however, also results from the peculiarity of the object of the legal-historical reconstruction itself—namely, the production of law. For the "law" we are reconstructing as historians – at least in the more recent Western historiographical tradition – is not considered a somehow given and objectively existing order. Rather, the object of the legal-historical analysis can only be the communication of those involved as to what is considered right and not right. If we put aside for the moment the problem concerning the differentiation of various modes of normativity, which will be discussed in more detail below, and simply speak of 'law,' then, in a simplified sense, we could say with regard to the aims being discussed here that the object of our historical observation—law—consists of regulative patterns whose binding claim is more or less recognized, in legal-institutional contexts are more or less competently implemented, and with which one must contend in the framework of the contingencies of the social world. As a consequence, legal history has to reconstruct this social world in which the law is embedded. Moreover, the process of constituting the meaning of what is being called

'law' occurs every time a normative statement is formulated. This means that in the historical reconstruction, the focus should be on the conditions of this process of generating meaning. Legal-historical reconstruction, accordingly, has to reconstruct the entire epistemic and communicative setting involving the determination and implementation of law – and this is only possible with an eye toward the concrete local situation.

Prioritization of the local necessarily means prioritizing the local practices. Local practices, however, refers to all locally situated practices having to do with the act of production or reproduction of normativity. In other words, we are talking about "praxis" in the sense of embodied practice, which encompasses both implicit knowledge as well as learned or other kinds of social practices. These implicit forms of knowledge and practices can influence the drafting of a law, the composition of a book, a judgement, a speech or the painting of a picture—the latter of which played an important role, especially in so-called pre-modern societies, concerning the communication of law, just as 'visualizing law' is becoming increasingly important in today's visual culture. Conceiving of global legal history as a process of 'glocalization' thus means to reconstruct the appropriation of (global) normativity, transmitted in whatever way to those who are producing law, by looking at the local circumstances of producing meaning. Global legal history, as it is understood here, is thus very different from world legal history and cannot be detached from local histories.

2. Multi-normativity

The second methodological approach touches upon the interaction of different normative systems that ensue, in particular, within imperial spaces or colonial constellations. The resulting overlap of normative spheres, their coexistence and interaction is one of the central issues of global legal history and a major issue within present debates in legal studies (see, for example, Berman 2014). How can we adequately communicate about these very different normative spheres without distorting the historical formations we are analyzing? How can we understand their reproduction? And how can we analyze the dynamics of interaction between these normative spheres?

To do so, it is necessary to apply a terminology apt for an intercultural analysis of legal spheres – this is often discussed under the heading 'legal pluralism' and similar designations (*a*). However, due to the fact that meaning is being produced in specific local settings, it is necessary to integrate normative spheres, which are usually not considered in these conceptual frameworks, like the normativities guiding the process of producing meaning itself (*b*). In addition to this, to make the concept of 'normative and jurisdictional pluralism' analytically fruitful, global legal history needs analytical models that help to understand the dynamics of normative (re)production in societal constellations characterized by diversity (*c*).

The combination of these analytical approaches focusing on different normative spheres, on rules guiding and underlying cultural practices, and on the dynamics of cultural production in social settings characterized by diversity is referred to as 'multi-normativity' (see Duve 2014b; for an early and slightly different use of the term, see Vec 2009).

a) Legal, Normative, and Jurisdictional Pluralisms

The first element designates a general methodological problem of legal-historical research that global legal history poses in a specific way: every mode of normativity – law, custom, etc. – is part of a broader context of normativities. Yet, how does one structure this field, how can one characterize the parts of these orders without falling into a distorting classificatory system like, for example, a Eurocentric state-centered legalistic perspective?

Similar questions have preoccupied the national legal-sociological, legal-theoretical, and legal-historiographic traditions for quite some time. However, under the conditions of globalization, they have acquired a renewed sense of urgency (for example, see Alford 1997). For when it comes to global studies, it has to be about finding a suitable language capable not only of shielding against modern or Western projections, but also capable of capturing diversity. It has to make space for very different linguistic and conceptual traditions and their ideas of normativity, behind which potentially incommensurable systems lie hidden. Thus, the field cannot allow itself to be structured in terms of a binary logic of, for example, 'law' and 'non-law,' or proceed from a state-oriented concept of law located at its center, from which then other modes of normativity are blocked off—as was the case in the European tradition.

Discussions about the diversity of relevant normative spheres are often carried out under the heading of 'legal pluralism.' Here, we are talking about a concept that has been used for more than 40 years, above all, by legal anthropologists, legal sociologists, as well as legal theorists, and which has been used by historians with greater frequency over the last ca. 15 years in order to describe situations where coexisting legal orders emerging from different sources occupy the same social space. The sometimes descriptively used concept is political-normatively charged; there are distinctions between 'strong' and 'weak' legal pluralism, and it is used differently within the context of very different social fields. Ten years ago, one of the most prominent representatives of the debate, John Griffith, suggested that it would be better to simply avoid the term 'law,' whereupon he instead suggested the term 'normative pluralism' (Griffith 2005). Moreover, Lauren Benton, who has introduced this term into legal historical debates, recently has come to favor the designation 'jurisdictional pluralism' (Benton/Ross 2013).

The discussion around this concept has forced open monistic-etatist perspectives, and it has opened our eyes to the historical normality of the co-existence of and (possible) competition between normative spheres. Notwithstanding these important positive effects, some generalizing assumptions about the nature of the 'legal' and of 'pluralism,' and frequent references to actual situations and practices (like 'forum shopping') have led to some simplification of the complex and profoundly different 'pre-modern' ways of organizing justice. They seduce us, for example, into naively assuming that the choice of courts always implies a choice of law, and, moreover, that specific jurisdictions can be identified with specific sets of regulations—something which, historically speaking, was not necessarily the case. In addition to this, there are reasonable doubts about the analytical force of the concept, if it is not related to a concrete situation capable of explaining the dynamic of normative production

and interaction (von Benda-Beckmann 2009). Other concepts like 'interlegality' seem more promising in this respect (Hoekema 2005). The discussion, however, has undoubtedly produced helpful offerings when it comes to the description of various forms of normativity that global legal history should take up. For example, Brian Z. Tamanaha proposed a pragmatic framework of communication by means of what he calls 'pluralistic socio-legal arenas.' He explicitly does not claim to be proposing a theory of inter- or transcultural law. He distinguishes between: official legal systems; customary / cultural normative systems; religious / cultural normative systems; economic / capitalist normative systems; functional normative systems; community / cultural normative systems. With regards to the status of these spheres, he emphasizes: "They overlap, there are borderline cases, different lines could have been drawn, and different categories could have been created. The value of this framework depends entirely upon whether it offers a useful way to approach, study, and understand situations of legal pluralism" (Tamanaha 2010). From his experience with Hindu and Islamic Law, over the years Werner Menski has developed an interesting, intercultural validated model of different forms of normativity based on an entirely different starting point (Menski 2012).

b) Conventions

Denoting different spheres of normativity and finding a common language for them is already an important step. However, this terminology needs to be accompanied by an analytical tool that serves to make another normative dimension visible, which is vital to the process of meaning production, yet does not belong to the primary or secondary rules in the sense H.L.A. Hart. It is about underlying assumptions, consented and thus somehow stable practices, about normativities that affect all sorts of cultural reproductions and thus also affecting the production of normative statements, yet which nevertheless remain completely implicit. How can we grasp and integrate these normativities – 'tertiary rules', if you will – into our analysis?

Those dealing with legal history encounter numerous examples of the great significance such normative spheres can have. For instance, the tacit consensus regarding appropriately selective implementation of norms, in general or in some specific cases (in the context of early modern Hispanic American law, see, for example, Duve 2007), or nearly tacit consensus regarding factors that are apparently important for the administration of justice in concrete circumstances, such as ethnic affiliation, lifestyle, belonging to a certain religious confession (see, for example, Herzog 2003). Furthermore, ceremonial, technical regulations, dictates of tastes or fashion, belong here as well, insofar as they are not already included in the area of what one might consider 'normative pluralism' and thus part of the normative spheres generally addressed under the heading of 'legal pluralism' (Vec 2009; 2011). It is perhaps these forms of normativity—often foreign to legal-historical analysis—that might just offer a key to understanding some of the rationalities of producing normativity or decision-making.

Interestingly, some of these phenomena have been addressed by the more recent French 'sociology of conventions' (Diaz-Bone/Thévenot 2010; Diaz-Bone/Didry/Salais 2015). Here,

conventions are understood in terms of interpretative frames that coordinate operative situations. These conventions develop out of concrete situations and can be stabilized network structures. They are related to specific forms of cognition and are applied with a normative intention. The conceptual reflections of this sociology of conventions seem quite helpful when reconstructing the complex process of producing normativity, especially in the context of 'glocalizations'. They might provide legal history with tools for analyzing complex and diverse societies with a plurality of bodies, which produce law and do so drawing upon diverse cultural practices.

c) Dynamics

The combination of these two perspectives – the norm-theoretical approach of 'normative and jurisdictional pluralism' as well as the more action-theoretical approach of the 'sociology of conventions' – increases the chances of describing the complexity of normative orders, as well as the appropriation process in the area of normativity. Yet even together they do not grasp the dynamics leading to these processes of (re)producing normativity, especially in diverse settings. Above all, even when combined, they do not escape from the danger of essentializing the normative spheres, as if these were stable. Cultural studies and social science, in contrast, have shown that the production of normativity by groups can only be dynamically, situationally, and relationally understood. Thus, the analysis of these normative spheres has to be accompanied by a reflection about the dynamics of producing normativity in a setting characterized by diversity. If one wants, for example, to come up with a picture of the indigenous peoples' normative orders under colonial rule, then it would not be possible unless the mechanisms of the construction of ethnicity are taken into consideration (see, for example, Rappaport 2014). In a similar way, the legal status of Jews in the Middle Ages, or of Lutherans in Catholic societies of the Early Modern period, for example, can only be understood by investigating the conditions under which these groups—relational, situationally—constitute themselves as a group, are culturally constructed and normatively equipped in interactions with the other groups (Nirenberg 2013). If it wants to understand complex societies and the forms in which their regulatory regimes reproduce themselves, global legal history needs to draw upon social scientific expertise engaged in the analysis of these dynamics, for example, in the ongoing debates about ethnic boundary making and conviviality (Wimmer 2013; Vertovec 2015).

3. Typology

Another fundamental problem connected with (legal) historic and (legal) comparative research, which global legal history poses in an intensified form, consists in the integration of historical case studies into a meaningful analytic framework.

European legal history scholarship has been working primarily with the help of Max Weber's ideal types. The Weber-inspired method concerning the formation of ideal types needs

to be distinguished from concrete types Max Weber himself created—the latter of which has, in the meantime, been criticized in the post-colonial debate due to the comparatively limited empirical basis and the mirroring of Eurocentric images (see, for example, Marsh 2000). This critique reminds global legal history to make every effort to carefully and rigorously come up with decentralized types, i.e. not to derive the ideal types from just one pre-conception extrapolated from one context, for example, from the European experience. To what extent the doctrine of types itself is to be understood in terms of epistemic assumptions related to Neo-Kantian thought and thus in terms of particular cultural contingencies, still requires discussion. While for Europeans the same way of producing ideal-types might seem evident, other epistemic communities might very well see things differently.

Leaving aside these open questions, if one is searching for ideal types suitable for the specific aims of global legal history, then the recent analytic-oriented research on governance seems quite promising. It is primarily focused on finding a set of instruments for describing and analyzing practices and institutions of governance in light of transnationalization of law. Of primary interest here are the institutions and regulatory structures belonging to 'governance collectives,' also referred to as 'regulative collectives'. The fruitfulness of an exchange between these fields of research and historical research has recently been emphasized by both sides (Esders/Schuppert 2015) and could be a starting point for further dialogue with the aim to develop a language suitable for analyzing governance in an intercultural setting, which then might offer interesting analytical tools for global legal history.

4. Translation

A fourth fundamental problem consists in the development of a method capable of assisting in the analysis of the specifics of the appropriation of normative options stemming from other areas in the process of producing normativity. In the end, it is about looking more deeply at the process of appropriation, which was sketched out within the context of the deliberations concerning 'glocalization.' If the constitution of meaning takes place locally, how then exactly should we analyze what happens within this process of appropriation?

Here as well, global legal history is able to draw upon a long legal historical tradition (see Duve 2014b). For quite some time, the normative exchange process was characterized by the concept 'reception.' The reifying and diffusionist legacy of the historiographic tradition concerning the reception, however, left little room for the analysis of the creative reproduction process, as it was sketched out in connection with the concretization of norms in the act of 'glocalization'. Until recently, little attention has been paid in legal history, in contrast, to translation-scientific approaches. They are concerned with the analysis of the intersubjective transferability of signs and systems of significance and the manner of impact by linguistic or even non-linguistic transfer processes by means of its cognitive scientific and linguistic implications. Even if one does not wish to view all transcultural studies as a problem of translation, it should be obvious that a linguistic and cultural-scientific informed approach is indispensible for a global legal history. Of particular interest for global legal history might be

the efforts that combine conceptual-historical and translation-scientific perspective, as Peter Burke has proposed in his work on 'cultural translation' (Burke 2007; see also Foljanty 2015).

C. Final Remarks

These remarks have, perhaps, made clear that legal historical scholarship—whether as legal history in a global-historical perspective or as a history of the globalization of law, whether as part of the general historiography or as legal-scientific basic research—stands before a fascinating, yet also intimidating situation. It is shaped by its origin as a discipline, which deals with national law. For a long time, there was a general consensus about its disciplinary identity, whose foundational state-centered concept of law was, perhaps, not explicit, yet represented a consensus. Today it sees itself as belonging to at least two disciplines: historiography and legal science. The transnationalization of the legal system, as well as of higher education and the research system dictate that, due to the irreducible national dimension of legal science, it will continue to serve national logics and, at the same time, needs to develop global logics. The intellectual and institutional challenges are huge, and so too are the opportunities.

While certainly not treating all of the problems that require further analysis, e.g. the theories of change, and the complex question concerning the possibility of observing the evolution of systems as such, this overview of the methodological approaches, nevertheless, makes it clear that global legal history also has the opportunity to draw upon a lot of knowledge accumulated in neighboring disciplines. It stands before methodological challenges, which basically represent the primary object of research in other disciplines in the humanities and social sciences. In the four methodological approaches selected here, it can and has to draw upon legal theory and general epistemology (glocalizations), upon theories of norms and action (multi-normativity), upon social and political scientific methods (typology), as well as to cultural scientific studies (translation). This requires knowledge *of* and deciding *between* the variety of theories and methods on offer. Last but not least, the question arises in relation to all of these foundations whether these are even interculturally valid?

The necessary international and intercultural discussion of these questions refers to the institutional dimension. Legal history scholarship, especially as a sub-discipline of legal science, must keep on generating local historical knowledge and take up its role in the national systems. At the same time, it has to set up a parallel transnational structure. Occasionally, it even appears as though, by means of the transnationalization and the need (and political pressure) for interdisciplinary cooperation, that the national and the disciplinary structures are institutionally and intellectually eroding. This weakening of traditional national and disciplinary structures is not without risk. Knowledge production presupposes a number of requisites to be functional, and up to now these conditions have been shaped in the era of the nation-state. How do we replace them on a transnational scale? For example, to be effective, disciplines need to concentrate their scholarly attention to a limited set of problems. They need mecha-

nisms to safeguard quality and reputation. They need mechanisms of socialization, of selection, and hierarchies – mechanisms that, from time to time, obviously have to be overthrown and replaced by new ones. They require plurality—both intellectual and linguistic. At the moment, many of these vital mechanisms for a well-functioning production of knowledge seem to be under threat. The necessity of crossing disciplinary frontiers and international cooperation might result in dysfunction and lead to a destruction of the traditional, national, and disciplinary structures without having created and stabilized transnational ones.

In this context, how we set up our research infrastructures is gaining in importance. It is, however, not only a question of efficiency, but also of intellectual justice. Research infrastructures can offer enormous opportunities, but also deepen existing or produce new inequalities. Knowledge infrastructures might provide spaces of integration for scholarly communities, replacing some of the vital functions national communities, research institutes, or physical spaces have fulfilled in the past. They might also contribute to establishing new ways of focusing scholarly attention on certain issues or new mechanisms of quality control. They should definitely provide equal access for participation in scholarly discussions, especially regarding those areas traditionally underrepresented. They should enhance diversity. Only when doing so, can there be an intellectually fruitful global legal history.

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